> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE AND FACTS

Petitioner Marcus Jeffrey Barnhardt was charged with second degree murder, with use of a firearm, in Orange County Superior Court in Santa Ana, California. *People v. Marcus J. Barnhardt*, Orange County Superior Court No. 95NF1769. Mr. Barnhardt was indigent and was forced to defend the charge through appointed counsel, deputy public defender Sheryl Beasley.

The trial evidence established that Mr. Barnhardt shot and killed his friend and neighbor, Steven Johnson, on June 24, 1995. The shooting occurred when Mr. Johnson asked Mr. Barnhardt to come into his residence. Mr. Barnhardt armed himself with a handgun because he was afraid of Mr. Johnson, with whom he had recently had a fight. As Mr. Barnhardt entered the residence, Mr. Johnson kicked the door closed and picked up a knife. Mr. Barnhardt reached for his gun, and Mr. Johnson threw something at Mr. Barnhardt. The gun went off, striking Mr. Johnson, who died as a result. The prosecution played a videotape of Mr. Barnhardt's post-arrest interrogation, in which Mr. Barnhardt stated that the shooting "was an accident." Mr. Barnhardt described the shooting as follows:

> I thought he was throw[ing] [a]t me in anger. And he didn't say nothing about that. I took the [h]it, I took the gun out just in case. You know, if this guy rushes me I'm going to fucking probably end up shooting him. And uh, then when he threw the, when threw the, threw the lock and shit like I kinda turned __ lock hitting __ in the back of my leg. But it hitting him. And when it did it wasn't like,

> it wasn't like what I shot. He was, I wasn't like my arm or nothing man, I was just, I just freaking went boom like that.
>
> . . .
>
> MB [Petitioner]: I fucking. I think that I was going to pull it just to like show it to him. You know like fucking.
>
> MF [Detective Michael Foster]: Back off.
>
> MB Back off, but it was just like boom.

Petitioner Barnhardt's account during the interrogation was that the gun just "went off" as an unintentional event when he turned his body in reaction to a lock being thrown at him. But Mr. Barnhardt was clear that the act of discharging the gun was not an act of self-defense to a thrown lock. Similarly, Mr. Barnhardt testified at trial that he reached for his handgun when Johnson was waving a knife around, and that Johnson made a throwing motion. But Mr. Barnhardt also testified that he never "wanted to shoot Mr. Johnson, never." Mr. Barnhardt testified directly that the homicide was an accident (RT 798):

> Q. BY MS. BEASLEY: Do you remember detective Foster talking to you about whether or not the shooting of Mr. Johnson was an accident?
>
> A. Yes.
>
> Q. Was it an accident, Mr. Barnhardt?
>
> A. Yes, I felt it was.

There was no evidence which supported a theory based on self-defense. Mr. Barnhardt never stated, during either the interrogation or his trial testimony, that he intentionally shot at Johnson because he was in fear of imminent death or great bodily injury. Such a cause-and-effect relationship between an actual fear and the intentional execution of the lethal act is a pre-requisite to a finding either of complete self-defense or imperfect self-defense, the two trial theories argued by Ms. Beasley – and the only defense theories presented to the jury.

Ignoring Mr. Barnhardt's account of how the homicide occurred, Ms. Beasley did not request jury instructions on the complete defense of accident and misfortune, such as CALJIC No. 4.45. Nor did she request jury instructions on involuntary manslaughter due to the commission of a misdemeanor of brandishing a weapon or involving criminal negligence, which would have warranted a conviction on that lesser offense under CALJIC No. 8.45 (Involuntary Manslaughter – Defined), or CALJIC No. 16.290 (Exhibiting Firearm/Deadly Weapon.) The trial court gave no instructions on either doctrine.

In her closing argument to the jury, Ms. Beasley argued both justifiable homicide due to reasonable self-defense, and involuntary manslaughter due to imperfect self-defense. However, she did not argue for acquittal based on accident and misfortune, and indeed the word "accident" was never mentioned by her in the argument. Nor did Ms. Beasley present any argument requesting that the jury return an involuntary manslaughter verdict based on criminal negligence or an unintentional death resulting from the commission of a misdemeanor.

The jury convicted Mr. Barnhardt of second degree murder with use of a firearm, and he was sentenced to serve 10 years on the firearm enhancement, consecutive to an indeterminate term of 15 years to life imprisonment.

Mr. Barnhardt appealed the conviction to the California Court of Appeal, Fourth Appellate District, Division Three, No. G023351. The appellate court appointed panel attorney Sharon Jones to represent Mr. Barnhardt on appeal. Ms. Jones filed an opening brief and a reply brief, but waived oral argument, filed no other briefs on the merits, and filed no related petition for writ of habeas corpus. Ms. Jones did not argue that trial counsel was ineffective because she had jettisoned the defenses which Mr. Barnhardt's testimony would have supported, i.e., the defenses of accident and misfortune, or that the evidence established only the lesser offense of misdemeanor manslaughter. Nor did Ms. Jones argue that trial counsel was ineffective by failing to seek instructions on those doctrines. Nor did Ms. Jones argue that the trial court had an obligation to instruct on the defense of accident and misfortune and the lesser offense of involuntary manslaughter on its own motion.[1]

The California Court of Appeal affirmed Mr. Barnhardt's conviction on February 27, 2001. Mr. Barnhardt's petition

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[1] It is settled California law that a trial court has a *sua sponte* duty to instruct with CALJIC No. 4.45 (Accident and Misfortune) whenever there is evidence supporting the instruction, *People v. Gonzales*, 74 Cal.App.4th 382, 389-391, 88 Cal.Rptr.2d 111 (1999), and to instruct on all lesser-included offenses shown by the evidence. *People v. Sedeno*, 10 Cal.3d 703, 715-716, 112 Cal.Rptr. 1, 518 P.2d 913 (1974), disapproved on other grounds *People v. Flannel*, 25 Cal.3d 668, 684, fn. 12, 160 Cal.Rptr. 84, 603 P.2d 1 (1979); *People v. Jackson*, 49 Cal.3d 1170, 1199, 264 Cal.Rptr. 852, 783 P.2d 211 (1989).

for review was denied by the California Supreme Court on May 16, 2001, in No. S096706.

Mr. Barnhardt first argued that Ms. Beasley and Ms. Jones had failed to provide effective assistance of counsel, as guaranteed by the Sixth Amendment, in a habeas corpus petition filed in Orange County Superior Court, No. M-9676. That court denied the petition on October 2, 2002. Mr. Barnhardt filed a substantially identical petition with the California Court of Appeal, which was denied on November 21, 2002, in No. G31400. Mr. Barnhardt sought relief on the same two claims in a habeas corpus petition filed with the California Supreme Court, which was denied on July 30, 2003.

Mr. Barnhardt filed his federal habeas corpus petition on July 31, 2003, arguing that trial counsel Beasley and appellate counsel Jones were ineffective. Magistrate Judge Zarefsky recommended denial of the petition in a report filed on August 30, 2004. Appendix C. District Court Judge Feess adopted that report and recommendation, and entered judgment dismissing the petition with prejudice, on October 21, 2004. Appendix B.

Mr. Barnhardt filed a notice of appeal, *in pro per*, on November 18, 2004. Judge Feess denied a certificate of appealability on December 7, 2004, by checking a box on a form which stated the application was denied because: "There has been no substantial showing of the denial of a constitutional right."

Mr. Barnhardt retained present counsel to represent him in litigating a motion for issuance of a certificate of appealability, and counsel filed the motion on January 11,

2005. It is not known whether the written, twenty-page petition was ever considered by a justice of the Ninth Circuit, however, and there are strong indications that that it may not have been. The Ninth Circuit issued an order on March 22, 2005, denying the motion, without giving any statement of reasons. Appendix A. The order was not served on counsel, but instead was mailed to Mr. Barnhardt, who then was in special custody (isolation) at Soledad State Prison. Due to delays in the prison mail, by the time that counsel learned of the order denying the motion, the time to petition the Ninth Circuit for rehearing of the order had already expired. Subsequent oral and written requests by Mr. Barnhardt's counsel to clerks in the Ninth Circuit attempting to determine whether that Court ever actually considered counsel's written motion have not produced any indication whether the brief was actually considered.

REASONS FOR GRANTING THE PETITION

Mr. Barnhardt is well aware that this Court does not grant *certiorari* merely to correct errors of lower courts. However, this is the only Court which has jurisdiction to correct errors on the part of lower federal appellate courts, and to settle standards so that systemic errors do not recur. This case presents the opportunity to further clarify the standards governing issuance of certificates of appealability, and to remedy the manifest injustice which has doggedly trailed Marcus Barnhardt throughout his travails in the legal system.

In this case there can really be no question but that Mr. Barnhardt's trial attorney, through either ignorance or ennui, abandoned viable and legitimate defenses which were supported by her client's own account to the police and trial testimony, and in their place advanced theories which were

inconsistent with Mr. Barnhardt's account, which had no footing in the evidence, and which had no hope of success. Had the theories supported by Mr. Barnhardt's account been advanced, it is reasonably likely that he would have been acquitted of the murder charge on the basis of accident, or at worst been convicted only of involuntary manslaughter, a crime which under California law carries a less severe penalty.

The incompetence of trial counsel not only went unrecognized by Mr. Barnhardt's appellate attorney, but was compounded by her when she failed to advance on appeal the well-settled theory that in California a trial court judge has a *sua sponte* duty to instruct on the defense of accident and on the lesser-included offense of involuntary manslaughter due to a homicide resulting from criminal negligence or occurring in the commission of a misdemeanor.

The District Court opined that there was no "substantial" showing of the denial of a constitutional right, but it does not appear that the District Court understood that it is the claim of a denial of the *effective assistance of trial counsel*, and of the *effective assistance of appellate counsel*, and not merely the right under state law to secure jury instructions, that has been advanced by Mr. Barnhardt as the basis for relief.

Finally, it appears likely that the Ninth Circuit Court of Appeals deprived Mr. Barnhardt of meaningful assistance by his retained post-conviction counsel when it failed to enter counsel's appearance of record and apparently never considered the twenty page motion for a certificate of appealability which counsel filed on behalf of Mr. Barnhardt.

Mr. Barnhardt asks only that the order of the Ninth Circuit Court of Appeals denying a certificate of appealability be summarily reversed, and that his case be remanded to the Ninth Circuit, so that he may have a full and fair hearing of his appeal. In the alternative, Mr. Barnhardt submits that *certiorari* should be granted in order to clarify the important question of when a certificate of appealability should be granted by a United States federal court.

I. CERTIORARI SHOULD BE GRANTED BECAUSE A COA SHOULD HAVE ISSUED TO PERMIT REVIEW OF THE DISTRICT COURT'S RULING THAT COUNSEL WAS NOT INEFFECTIVE BY DISCARDING LEGITIMATE DEFENSE THEORIES BASED ON PETITIONER'S OWN ACCOUNT OF HOW THE SHOOTING OCCURRED, AND INSTEAD FOCUSING ON THEORIES OF SELF-DEFENSE WHICH HAD NO SUPPORT IN THE EVIDENCE.

A certificate of appealability should have issued because the District Court decision is not only palpably erroneous in its conclusions, but is also quite obviously infected by numerous errors concerning Mr. Barnhardt's argument that trial and appellate counsel failed to present available defenses which were consistent with his account and trial testimony, and instead presented inconsistent theories which had no support in the evidence.

The District Court opinion recommending dismissal of the opinion parses Mr. Barnhardt's claim that his state court attorneys failed to effectively litigate his defense of accident and the partial defense that the homicide amounted to no more than involuntary manslaughter, i.e., that the death was

caused without intent to kill by the commission of the misdemeanor of brandishing a firearm. Indeed, the opinion *entirely* fails to acknowledge, much less address, the latter omissions by his state counsel. Appendix C. The District Court's treatment of failure to instruct on accident fails to recognize that the jury instruction was necessary to *present the defense* to the jury. Each of the cases cited by the District Court concerning the defense of accident pertain to stand-alone claims of instructional error. However, it has always been Mr. Barnhardt's claim that the omission of trial counsel was not merely the failure to request a jury instruction, but the failure of trial counsel to competently litigate (through presentation of evidence, argument, and request for jury instructions) defenses which were supported by the trial evidence, and in the place of such theories advocate defenses which were not only unsupported by the trial evidence but inconsistent with his own testimony and pre-trial account of how the shooting of Mr. Johnson occurred.

The theories presented by Mr. Barnhardt's trial counsel, which were justifiable homicide as the result of reasonable self-defense and imperfect self-defense, were not established by the evidence, because both depend upon proof that the lethal act was committed *as a result* of an actual belief in the necessity to use such force to prevent death or great bodily injury. See *People v. Flannel*, *supra*, 25 Cal.3d 668, 680; *In re Christian S.*, 7 Cal.4th 768, 30 Cal.Rptr.2d 33, 872 P.2d 574 (1994); *People v. Bush*, 84 Cal.App.3d 294, 304, 148 Cal.Rptr. 430 (1978); *People v. Pena*, 151 Cal.App.3d 462, 475, 198 Cal.Rptr. 819 (1984); *People v. Gonzales*, 8 Cal.App.4th 1658, 1663, 11 Cal.Rptr.2d 267 (1992); *People v. Aris*, 215 Cal.App.3d 1178, 1188-1189, 264 Cal.Rptr. 167 (1989), disapproved on other grounds in *People v. Humphrey*, 13 Cal.4th 1073, 56 Cal.Rptr.2d 142, 921 P.2d 1 (1996).

As Mr. Barnhardt reported to the interrogating officers, and as he testified at trial, the shot was not fired due to any fear on his part, but solely because the gun unexpectedly discharged when he pulled it out to deter further aggressive actions on the part of Mr. Johnson. Trial counsel's exclusive reliance upon theories which were inconsistent with both Mr. Barnhardt's account during interrogation, and with the trial testimony which she herself elicited from him, could serve only to confuse the jury, and to undermine Mr. Barnhardt's credibility by suggesting that his own attorney did not believe his testimony. Appellate counsel was ineffective because she failed to recognize or litigate these deficiencies in trial counsel's performance.

Trial counsel not only presented defense theories which were inconsistent with the trial evidence, but also failed to present the defenses which *were* shown by Mr. Barnhardt's account, which were accident and misfortune, see CALJIC No. 4.45 (Accident and Misfortune); *People v. Gonzales*, *supra*, 74 Cal.App.4th 382, 389-391, *People v. Acosta*, 45 Cal.2d 538, 544, 290 P.2d 1 (1955), and involuntary manslaughter due to criminal negligence in brandishing a firearm. See CALJIC No. 8.45 (Involuntary Manslaughter – Defined); CALJIC No. 16.290 (Exhibiting Firearm/Deadly Weapon); Cal. Pen. Code, § 417, subd. (a)(2) (brandishing a firearm); *People v. McKinzie*, 179 Cal.App.3d 789, 793-794, 224 Cal.Rptr. 891 (1986) (violation of Penal Code section 417(a) which results in death constitutes involuntary manslaughter).

Trial counsel Beasley failed to request jury instructions on either the complete defense of accident and misfortune, or on the lesser offense of involuntary manslaughter due to the commission of the misdemeanor of brandishing a firearm, and the trial court did not instruct on these doctrines. Ms. Beasley argued to the jury that it should acquit based on

the defenses of justifiable homicide due to reasonable self-defense, and in the alternative she asked for a manslaughter verdict due to unreasonable or imperfect self-defense. But trial counsel Beasley did not argue for acquittal based on accident and misfortune, nor did she argue for an involuntary manslaughter verdict based on criminal negligence or misdemeanor manslaughter.

Appellate counsel Jones was equally ineffective when she failed to litigate the issue of trial counsel's ineffective performance in the appellate court, and when she failed to argue on direct appeal that the trial court had a *sua sponte* duty to instruct on the defense of accident and on the lesser-included offense of involuntary manslaughter due to criminal negligence and/or the brandishing of a firearm.[2]

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[2] A California state trial court not only has a *sua sponte* duty to instruct on defenses, *People v. Sedeno*, *supra*, 10 Cal.3d 703, 715-716, *People v. Jackson*, *supra*, 49 Cal.3d 1170, 1199, but must provide such instructions if under any rational view of the evidence a conviction on a lesser offense would be warranted. *People v. Tidwell*, 3 Cal.3d 82, 85-86, 89 Cal.Rptr. 58, 473 P.2d 762 (1970), disapproved on other grounds *People v. Ray*, 14 Cal.3d 20, 120 Cal.Rptr. 377, 533 P.2d 1017 (1975); see *People v. Breverman*, 19 Cal.4th 142, 162-163, 77 Cal.Rptr.2d 870, 960 P.2d 1094 (1998) ("instructions are required whenever the evidence . . . is 'substantial enough to merit consideration' by the jury.") The defendant's own testimony, even if "less than convincing," is sufficient standing alone to require such instructions. *People v. Turner*, 50 Cal.3d 668, 690, 268 Cal.Rptr. 706, 789 P.2d 887 (1990). The District Court opinion erroneously states that there was only one item or evidence which supported the defense of accident, and entirely fails to discuss evidence supporting the omitted defense theories of involuntary manslaughter. The evidence supporting those defenses was far stronger than recognized by the District Court. See summary of evidence in the Statement of the Case and Facts, *ante*.

Had appellate counsel Jones argued that it was error on the part of the trial court when it failed to give such *sua sponte* instructions, reversal would almost certainly have followed. A failure to instruct on a defense supported by the testimony of the accused is considered prejudicial on direct appeal in California because such an error deprives the accused of his Sixth Amendment right to have the jury consider his own exculpatory testimony. See *People v. Thurmond*, 175 Cal.App.3d 865, 874, 221 Cal.Rptr. 292 (1985). The error would have required reversal because the factual questions posed by the omitted instructions were not resolved adversely to Mr. Barnhardt under other, properly given instructions. *People v. Mayberry*, 15 Cal.3d 143, 158, 125 Cal.Rptr. 745, 542 P.2d 1337 (1975); *People v. Stewart*, 16 Cal.3d 133, 141-142, 127 Cal.Rptr. 117 (1976); *People v. Lemus*, 203 Cal.App.3d 470, 478-480, 249 Cal.Rptr. 897 (1988). Such an error cannot be cured on direct appeal by weighing the evidence and finding it is not reasonably probable that a correctly instructed jury would not have convicted the defendant. *People v. Stewart*, *supra*, 16 Cal.3d at p. 141; *People v. Lemus*, *supra*, 203 Cal.App.3d at p. 478; *People v. Rivera*, 157 Cal.App.3d 736, 743, 203 Cal.Rptr. 842 (1984).

In addressing the failure to instruct on accident, the District Court opined that the jury instructions which were given were adequate to cover the defense theories. Appendix C, pp. 16, 17. The District Court was not able, however, to identify which particular instruction(s) advised the jurors that accident was a complete defense to the homicide, or which instructions embraced the partial defense of involuntary manslaughter due to criminal negligence or an unintentional homicide occurring during the commission of a misdemeanor. Mr. Barnhardt submits that, contrary to the vague recital in

the opinion, none of the instructions given did cover these doctrines; the jury was not even provided with a verdict form on which it could have returned a finding of conviction of only involuntary manslaughter.

In fact, the jury was never given a verdict option which was consistent with an unintentional shooting, other than that for second degree murder, the crime of which Mr. Barnhardt was actually convicted. The instructions therefore did not embrace or necessarily resolve the omitted defense of accident, or the omitted lesser included offense of involuntary manslaughter arising from an unintentional homicide occurring as the result of criminal negligence or the commission of a misdemeanor. Under California law, the finding of a greater offense does not necessarily mean that the jurors rejected a finding of any lesser offense, where the jurors were not given the option of returning a verdict consistent with the lesser offense or mental state. "That the jury chose the greater over acquittal, and that the evidence technically permits conviction of the greater, does not resolve the question whether, it appears reasonably probable the jury would nonetheless have elected the lesser if given that choice." *People v. Breverman*, *supra*, 19 Cal.4th 142, 178, fn. 25.

In addressing the issue of prejudice, the District Court not only erroneously minimized the strength of the evidence, but failed to take into account Mr. Barnhardt's claim that even assuming *arguendo* that the evidence was inadequate it was due to his trial attorney's failure to adequately develop it. Appendix C. Trial counsel's failure to adequately litigate omitted theories can hardly be equitably invoked as grounds to excuse her very failure to litigate them. Moreover, the discussion of prejudice contained in the District Court

opinion states that the "evidence strongly supported the murder conviction and the jury's implicit finding that Petitioner intended to kill the victim, *or that he killed him while intentionally engaging in a dangerous activity.*" Appendix B; italics added. One such "dangerous activity" would be brandishing a firearm, and if the jury had been presented with that choice it may very well have returned a conviction for involuntary manslaughter. The District Court thus in substance and effect conceded that the evidence permitted the distinct possibility that the jury would have returned an involuntary manslaughter conviction, but unaccountably did not find prejudice from the failure of counsel to actively litigate it and obtain instructions under which the jury would be empowered to return such a verdict.

Finally, there is not a scintilla of evidentiary support for the District Court's recital that "trial counsel made a reasonable tactical decision to pursue a defense of self-defense and need not have pursued a conflicting defense of accident. Appendix C. There is *no* indication in the State record that trial counsel was ever aware of, let alone actually considered presenting, either a defense of accident or a partial defense of involuntary manslaughter. There is no evidence from any source that she was even aware that such defenses existed.

Even assuming *arguendo* that trial counsel was aware of those legal doctrines and did reject them in favor of self-defense doctrines, such a choice was not one which any reasonably effective attorney would make. If counsel actually did make such a tactical choice, she elected to present defenses which had no support in the evidence, and which conflicted with her client's consistent account of how the homicide occurred, including his pre-trial statements during

interrogation and his trial testimony. Counsel's performance is not immunized from scrutiny merely by attaching the label "trial strategy" to it. *United States v. Span*, 75 F.3d 1383, 1389 (9th Cir. 1996). "[C]ertain defense strategies may be so ill-chosen that they may render counsel's overall representation constitutionally defective." *United States v. Tucker*, 716 F.2d 576, 586 (9th Cir. 1983).

Whether trial counsel failed to litigate the appropriate defenses out of ignorance or out of palpably erroneous judgment and inattention, her performance was just as ineffective and the consequences to Mr. Barnhardt equally disastrous.

II. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE CIRCUMSTANCES UNDER WHICH A CERTIFICATE OF APPEALABILITY SHOULD BE GRANTED.

Prior to the enactment of the Antiterrorism and Effective Death Penalty Act (AEPDA), litigants were required to obtain a Certificate of Probable Cause to Appeal (CPC) before they were permitted to appeal the denial of a federal habeas corpus petition. *Barefoot v. Estelle*, 463 U.S. 880, 892-893, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983). AEDPA replaced the CPC requirement with a new procedural device, the Certificate of Appealability (COA). *See* 28 U.S.C. § 2253. The COA requirement applies to all appeals which are initiated after April 24, 1996. *Slack v. McDaniel*, 529 U.S. 473, 482, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000).

In order to be entitled to issuance of a COA under AEDPA, a petitioner is required to make "a substantial showing of the denial of a constitutional right." 28 U.S.C.

§ 2253(c); see *Morris v. Woodford*, 229 F.3d 775, 779 (9th Cir. 2000) *Lambright v. Stewart*, 220 F.3d 1022, 1024 (9th Cir. 2000). This showing is satisfied if the petitioner "demonstrate[s] that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'" *Barefoot v. Estelle, supra*, 463 U.S. at p. 893, n. 4 (internal citations omitted). Stated differently, a petitioner must demonstrate only that "reasonable jurists could . . . debate the district court's rulings on the . . . issue he wishes to pursue." *Shackleford v. Hubbard*, 234 F.3d 1072, 1081 (9th Cir. 2001) (citation omitted.) "[A] COA ruling is not the occasion for a ruling on the merits of a petitioner's claim . . ." *Miller-El v. Cockrell*, 537 U.S. 322, 331, 154 L. Ed. 2d 931, 123 S. Ct. 1029 (2003); *Lambright v. Stewart, supra*, 220 F.3d at p. 1025. Courts should "resolve any doubt about whether the petitioner has met the *Barefoot* standard in his favor." *Lambright v. Stewart, supra*, 220 F.3d at p. 1025; see *Petrocelli v. Angellone*, 248 F.3d 877, 885 (9th Cir. 2001).

It is incomprehensible to Mr. Barnhardt why the Ninth Circuit Court of Appeals might have declined to issue a certificate of appealability in his case. Mr. Barnhardt submits that the issue of ineffective performance of both trial and appellate counsel is indeed not a debatable or close question – it is indeed one which in justice and under the law should be resolved in *his* favor. In these circumstances, it is evident that the Ninth Circuit and the District Court failed to apprehend, or to apply, the correct standard to his applications for issuance of a COA. Only this Court has the moral authority and jurisdictional power to further clarify and emphasize the duty of the Ninth Circuit to follow the *Barefoot* standard, and *certiorari* should be granted for that reason alone.

CONCLUSION

The petition for writ of *certiorari* should be granted. Mr. Barnhardt seeks only an opportunity to have a full and fair hearing on his appeal to the Ninth Circuit, to review whether the District Court erred in rejecting his claims of ineffective assistance of counsel. Any procedure by which this Court can assure that such a hearing is held is fully acceptable to Mr. Barnhardt, including any summary disposition or order by which this Court may grant such relief.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING REQUEST FOR A CERTIFICATE OF APPEALABILITY AND ALL OUTSTANDING MOTIONS FILED MARCH 22, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-57110

D.C. No. CV-03-01198-GAF
Central California
(Santa. Ana)

MARCUS JEFFERY BARNHARDT,

Petitioner - Appellant,

v.

EDWARD S. ALAMEIDA, JR., Director of the California Department of Corrections,

Respondent - Appellee.

ORDER

Before: GOULD and BYBEE, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2). All outstanding motions are denied.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED OCTOBER 19, 2004 AND FILED OCTOBER 21, 2004

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. SA CV 03-01198 GAF (RZ)

MARCUS JEFFREY BARNHARDT,

Petitioner,

vs.

EDWARD S. ALAMEIDA, JR., Director,

Respondent.

JUDGMENT

This matter came before the Court on the First Amended Petition of MARCUS JEFFREY BARNHARDT for a writ of habeas corpus. Having reviewed the First Amended Petition and supporting papers, and having accepted the Report and Recommendation of the United States Magistrate Judge,

Appendix B

IT IS ORDERED AND ADJUDGED that the First Amended Petition is denied and the action is dismissed with prejudice.

DATED: 10/19/04

s/ Gary A. Feess
GARY A. FEESS
UNITED STATES DISTRICT JUDGE

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED AND FILED AUGUST 30, 2004

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. SA CV 03-01198 GAF (RZ)

MARCUS JEFFREY BARNHARDT,

Petitioner,

vs.

EDWARD S. ALAMEIDA, Jr., Director,

Respondent.

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636 and General Order 01-13 of the United States District Court for the Central District of California, the undersigned submits this Report and Recommendation to the Honorable Gary A. Feess, United States District Judge. The undersigned recommends that the Court deny the First Amended Petition on its merits and dismiss the action with prejudice.

Appendix C

I.

BACKGROUND

On March 30, 1998, an Orange County Superior Court jury convicted Petitioner Marcus Jeffrey Barnhardt of second degree murder with the personal use of a firearm; the trial court sentenced Petitioner to twenty-five years to life in state prison. (Reporter's Transcript ("RT") 1217-46; Clerk's Transcript ("CT") 435-36, 481.) Petitioner appealed his conviction and the California Supreme Court denied his Petition for Review on May 16, 2001. (Lodgment Nos. 2, 3.)

On August 12, 2002, Petitioner filed a Petition for Writ of Habeas Corpus in the Orange County Superior Court which the court denied as untimely on October 2, 2002. (Lodgment Nos. 4, 5.) Petitioner filed habeas petitions in the California Court of Appeal and the California Supreme Court, which were denied with silent denials on November 21, 2002 and July 30, 2003, respectively. (Lodgment Nos. 6-9.)

Petitioner, through counsel, filed the present Petition for Writ of Habeas Corpus by a Person in State Custody (28 U.S.C. § 2254) in this Court on July 31, 2003. On October 31, 2003, the Undersigned recommended granting, without prejudice, Respondent's Motion to Dismiss the Petition as partially unexhausted. On November 25, 2003, Petitioner filed a First Amended Petition deleting the unexhausted claim. Respondent has answered the merits of the First Amended Petition and Petitioner has filed a Traverse to the Answer. As explained below, the First Amended Petition should be denied on its merits.

Appendix C

II.

PROCEDURAL DEFAULT

In the First Amended Petition, Petitioner contends that his trial and appellate attorneys were ineffective in numerous instances. (First Amended Petition, at 5, att.) Petitioner did not raise any claims of ineffective assistance of counsel on direct review in state court. (*See* Pet. for Rev.) When his direct review concluded in 2001, however, he obtained a new attorney who filed a habeas petition in Superior Court alleging the ineffective assistance of counsel claims raised in the present First Amended Petition. (*See* Lodgment No. 5, at 1.) The Superior Court denied this petition as untimely, finding that "Petitioner does not adequately justify the over four year delay in the presentation of his claims for relief." (*Id.*) The Superior Court did not also address the merits of Petitioner's claims. (*See id.*) The California Court of Appeal and Supreme Court denied subsequent habeas petitions without comment. (Lodgment Nos. 7, 9.) Respondent contends that these state court denials bar federal habeas review.

The Court has reviewed the merits of Petitioner's ineffective assistance of counsel claims and, as explained below, finds that they do not have merit. The Court will address the merits of the claims, therefore, rather than analyze the complex issues raised by the application of the procedural bar doctrine to Petitioner's case. *See Lambrix v. Singletary*, 520 U.S. 518, 524 (1997) ("We do not mean to suggest that the procedural bar issue must invariably be resolved first; only that it ordinarily should be."); *Walters v Maass*, 45 F.3d 1355, 1360 n.6 (9th Cir. 1995) (noting that where a claim fails on the merits, interests of comity and judicial economy may be better served by addressing the claim on the merits).

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III.

PETITIONER'S CLAIMS

The California Court of Appeal found the following facts underlying Petitioner's conviction:

> [Petitioner] and Steven Johnson lived in adjacent bungalows in Artesia but were not on friendly terms. Their mutual pique came to a head on the night of June 24, 1995, when Johnson, intoxicated, summoned [Petitioner] onto his property and accused him of breaking into his home some weeks earlier. [Petitioner] turned around and walked to his truck, retrieved a gun, and went back to continue his parlay with Johnson.
>
> Once he stepped into the house, he saw Johnson holding a knife in one hand and a lock in the other. Following an exchange of insults, Johnson threw the lock in his direction. [Petitioner] responded by pulling his gun and firing a single bullet into Johnson's head – killing him. After throwing up, smoking a few cigarettes, and cleaning the area with Pinesol, he wrapped the body in a rug and some plastic and used Johnson's truck to transport the corpse to a Weir canyon construction site in Anaheim Hills, where he dumped it.

(Lodgment No. 2, at 2.)

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IV.

STANDARD OF REVIEW

In the usual case, this Court will assess a petition for habeas corpus pursuant to the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which provides in part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding:

28 U.S.C. § 2254.

Here, however, the state courts did not reach the merits of the claims Petitioner raises in his First Amended Petition. Petitioner presented these claims to state court only on habeas review, and his habeas petitions were denied because they were untimely. Although in denying Petitioner's habeas

petition the Orange County Superior Court reviewed Petitioner's case to determine that no "fundamental miscarriage of justice" occurred in Petitioner's trial, under California law that review was pursuant to state law only. *In re Robbins*, 18 Cal. 4th 770, 811-12, 77 Cal. Rptr. 2d 153 (1998); *Bennett v. Mueller*, 322 F.3d 573, 581-83 (9th Cir.), *cert. denied*, 124 S. Ct. 105 (2003). By silently denying Petitioner's habeas petitions, the California Court of Appeal and Supreme Court applied the same reasoning and denied the petitions on the same timeliness ground. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

In a situation such as this – where there is no state court decision to which to accord deference under the AEDPA – review is *de novo*. *Pirtle v. Morgan*, 313 F.3d 1160, 1167-68 (9th Cir. 2002), *cert. denied*, 539 U.S. 916 (2003); *Nulph v. Cook*, 333 F.3d 1052, 1056-57 (9th Cir. 2003). However, "under AEDPA, factual determinations by the state court are presumed correct and can be rebutted only by clear and convincing evidence." *Pirtle*, 313 F.3d at 1168; *see also* 28 U.S.C. § 2254(e).

V.

SIXTH AMENDMENT RIGHT TO COUNSEL

For ease of analysis, the Court considers together Petitioner's three claims regarding his attorneys' failure to argue that the police violated Petitioner's Sixth Amendment right to counsel. Specifically, Petitioner claims that his trial attorney was ineffective because she did not argue that the police violated Petitioner's Sixth Amendment right to counsel

when they interviewed him without an attorney after his Sixth Amendment right to counsel had attached. (First Amended Petition, at 5, att.) Further, he argues that his appellate counsel was ineffective because she did not argue that trial counsel was ineffective in this manner and did not also, herself, argue the underlying Sixth Amendment violation. (*See id.*)

To establish a *prima facie* claim of ineffective assistance of counsel, Petitioner must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Petitioner bears the burden of establishing both components. *Id.* Deficient performance is performance which is objectively unreasonable under prevailing professional norms. *Id.*, 466 U.S. at 687-88. Under *Strickland*, counsel's deficient performance prejudices a petitioner where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 466 U.S. at 694.

In reviewing trial counsel's performance, the Court will strongly presume that counsel's conduct was within the wide range of reasonable assistance, and that she exercised acceptable professional judgment in all significant decisions made. *Id.*, 466 U.S. at 689. Only if counsel's acts or omissions, examined within the context of all the surrounding circumstances, were outside the "wide-range of professionally competent assistance," will Petitioner meet his initial burden. *Id.*, 466 U.S. at 690.

The standards for determining ineffectiveness of trial counsel apply equally to determining alleged ineffectiveness

of appellate counsel. *Morrison v. Estelle*, 981 F.2d 425, 427 (9th Cir. 1992). A petitioner "must show that counsel's advice fell below an objective standard of reasonableness, . . . and that there is a reasonable probability that, but for counsel's unprofessional errors, [he] would have prevailed on appeal." *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989).

Anaheim Police Detective Michael Foster arrested Petitioner at his home on July 20, 1995, but did not then advise Petitioner of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). (RT 258-60, 275.) Before leaving his house, Petitioner, a diabetic, was allowed to receive an insulin shot from his girlfriend. (RT 261.) A second Anaheim Police Detective, Detective Pittington, testified that he drove Petitioner to the police station and, en route, his partner asked Petitioner when he was due for his next insulin shot to which Petitioner responded, "ask my attorney." (RT 340-42.) Petitioner testified instead that Detective Pittington questioned him about the murder and in response to that question Petitioner answered, "go ask my attorney" or "I want an attorney." (RT 306-08.) Detective Pittington testified further that, once at the station and while Petitioner was in an interview room, Petitioner answered "ask my attorney" in response to routine booking questions. (RT 345-46.)

Thereafter, Detective Foster moved Petitioner to a room containing taping equipment and made a comment to Petitioner about the food the two were eating. (CT 487; RT 264-67.) The transcript of the interview shows that Petitioner then asked Foster, "So when do I get arrested?" (*Id.*) Detective Foster interpreted this question to be asking why (not when)

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Petitioner was arrested, as did the California Court of Appeal. (*Id.*, Lodgment No. 2, at 3.) In his Petition for Review, Petitioner conceded that the context and the videotape made clear that Petitioner actually asked why he had been arrested. (Pet. for Rev., at 11 n.2.)

Foster answered Petitioner that the police suspected he killed Johnson. (CT 487.) Petitioner immediately engaged in a limited discussion with Foster in which he ultimately denied committing the killing. (CT 487-88.) Once Petitioner denied killing the victim, Foster stated: "Well, what I'm gonna do is I'm going to advise you of your rights first um [*sic*] before I talk to you and you've been in – in jail before and you've been in trouble before and so I'm - I'm fairly confident that you know." (CT 488-89.) Foster informed Petitioner of his *Miranda* rights and Petitioner indicated he understood his rights and was willing to talk to Foster. (CT 489.)

Immediately thereafter, the following exchange took place:

> Foster: Okay. Marcus, my understanding is that when I, before I came up here the other officers were talking to you and you kept saying ask my attorney, ask my attorney.
>
> Petitioner: I don't have an attorney. I don't know what the fuck they were doing to me. You know I all of a sudden I'm, ch, [*sic*] you know they arrest me I was being a smart ass is what I was being.

Foster: Okay.

Petitioner: Plain and simple.

Foster: So, but knowing that, you're willing to talk to me now.

Petitioner: Yeah. I - I mean I don't, I didn't understand you know wh-what was going on you know. They - They were nice and everything they were cool. You guys have always been nice and cool and shit, but damn man.

Foster: Did - did you say you basically were saying that because you were being a smart ass.

Petitioner: I was just being a smart ass.

Foster: Okay.

Petitioner: I don't have an attorney.

Foster: That's all right. Do you understand that one will be appointed for you if you wish?

Petitioner: Yeah, I can, I understand that.

(CT 489-90.) The detectives questioned Petitioner and Petitioner eventually confessed to killing the victim. (CT 539-57.)

Before trial, on July 9, 1997, Petitioner's attorney, Sheryl Beasley, moved to exclude evidence of Petitioner's confession to police. (RT 73.) Ms. Beasley argue that the confession was involuntary based on Petitioner's diabetic

condition. (*See id.*; CT 227-28.) The court heard evidence regarding the confession and rejected the defense motion. (*See* RT 150-51; CT 227-28.)

In December 1997, Petitioner's case was reassigned and on March 11, 1998, was set for trial before a new judge. (*See* RT 204; CT 265, 299.) For reasons that are not apparent in the record, on March 12, 1998, a second hearing was held on the admissibility of Petitioner's confession to police. (RT 221-368; CT 300-02.) (The above-recounted testimony was received at this second hearing.) In this second hearing, Ms. Beasley's main argument clearly was that the confession was involuntary or taken in violation of Petitioner's *Miranda* rights (*i.e.*, his Fifth Amendment right to counsel). (RT 368-75; CT 295-98.) However, she also mentioned at least three times in her oral argument to the court that the confession was taken in violation of Petitioner's Sixth Amendment right to counsel. (RT 368-72.)

At the conclusion of the hearing, on March 16, 1998, the new trial judge again ruled the confession admissible, as follows:

> Before you bring the jury in, the record should reflect the Court has fully considered the issue regarding the statement of the Defendant to the Anaheim Police Detective Michael Foster.
>
> The Court has evaluated the credibility of the witnesses that testified in that. The Court has considered the authority cited.

> After reviewing those authorities, the Court finds that there was no indication of the right to counsel by the Defendant.
>
> The Court finds that those statements were not taken contrary to his *Miranda* rights and that the statements were voluntary, and the Court finds those statements admissible.

(Lodgment No. 11; CT 311-12.)

On direct appeal to the California Supreme Court, Petitioner's appellate attorney argued that the police questioning violated Petitioner's Fifth Amendment rights pursuant to *Miranda v. Arizona*. (*See* Pet. for Rev., at 10-18.) Counsel also made one reference to the Sixth Amendment, but did not elaborate on any Sixth Amendment violation. (*Id.*, at 12.) The Court of Appeal denied Petitioner's claim in part as follows:

> Barnhardt claims his confession was erroneously admitted into evidence because it was obtained after he had invoked what he refers to as his "constitutional right to counsel." We cannot agree – either with his argument or his terminology.
>
> First, we need to be absolutely clear about what right is at issue here. There are two rights to counsel. They have different sources, and they apply at different times. Only one is mentioned and guaranteed in the United States Constitution

> – in the Sixth Amendment – and by its own terms, it *only* applies to individuals who stand "accused" in "criminal prosecutions." (U.S. Const., amend. VI.) At the time of his purported invocation, Barnhardt had not been formally charged with any criminal offense; consequently, he had no "constitutional right to counsel" to invoke. (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 175-176; *United States v. Gouveia* (1984) 467 U.S. 180, 188.)
>
> On the other hand, a second right to counsel – known as the *Miranda* right to counsel – exists. . . . It applies *whenever* the government subjects a suspect to custodial interrogation, whether the Sixth Amendment right to counsel has been triggered or not. . . . Given the timing of Barnhardt's purported invocation, it is clear that this is the right at issue here.

(Lodgment No. 2, at 4) (emphasis in original.) The Court of Appeal then denied Petitioner's Fifth Amendment claim because Petitioner was not subjected to custodial interrogation when he said "ask my attorney" and found again that Petitioner had no federal constitutional right to counsel (*i.e.*, no Sixth Amendment right to counsel) to invoke. (*Id.*, at 5.) The Court of Appeal also found that Petitioner did not intend to invoke his right to counsel and that it was Petitioner, not the officers, who initiated the discussion about why he had been arrested. (*Id.*, at 6-7.)

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1. Counsel's Sixth Amendment Argument

Petitioner's claims that his trial and appellate attorneys failed to argue a Sixth Amendment violation do not merit habeas relief because, in fact, both did argue that the police violated Petitioner's Sixth Amendment right to counsel, as noted above. It appears that these arguments were conclusory and not supported by authority discussing the Sixth Amendment, but, nevertheless, Petitioner has not demonstrated that counsels' actions in this regard were so lacking that their performances were outside the "wide-range of professionally competent assistance." *Strickland*, 466 U.S. at 690; *see also Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000) (counsel need not perform flawlessly to provide effective assistance).

Further, even if this Court were to conclude that counsel effectively did not raise a reasonable Sixth Amendment challenge to the introduction of Petitioner's statement, Petitioner demonstrates neither that such omission was unreasonable nor prejudice from the failure, as demonstrated below.

2. Attachment of the Sixth Amendment

Petitioner has not demonstrated that his Sixth Amendment right to an attorney had attached by the time he was interviewed by the police on July 20, 1995. The Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const., amend VI. "A person's Sixth and Fourteenth Amendment right to

counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." *United States v. Gouveia*, 467 U.S. 180, 187 (1984); *see also Moran v. Burbine*, 475 U.S. 412, 431-32 (1986) (same). This right "does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial proceedings — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (internal quotation omitted).

Petitioner argues here that because he was arrested pursuant to an arrest warrant — which he contends must have been obtained through the filing of a complaint in municipal court — he had been formally charged with murder by the time he was arrested. *(See* First Amended Petition, att., at 2.) Petitioner's trial and appellate attorneys never made this exact argument but the California Court of Appeal expressly found that Petitioner had not yet been formally charged as of July 20, 1995. Petitioner cannot meet his burden to demonstrate ineffective assistance of counsel because it is not clear that the Court of Appeal was incorrect in making this finding.

There is California authority for the proposition that a defendant's Sixth Amendment right to counsel attaches with the filing of a felony complaint to obtain an arrest warrant, as Petitioner contends his attorney should have argued in his case. See *People v. Lebell*, 89 Cal. App. 3d 772, 152 Cal. Rptr. 840 (1979); *People v. Engert*, 193 Cal. App. 3d 1518, 239 Cal. Rptr. 169 (1987). On the other hand, the California Court of Appeal in Petitioner's case found to the contrary and in *People v. Wheelock*, 117 Cal. App. 4th 561, 11 Cal.

Rptr. 3d 796 (2004), the California Court of Appeal expressly found that the Sixth Amendment right to counsel does not attach with the issuance of an arrest warrant. *See Wheelock*, 117 Cal. App. 4th at 565-66; *see also* 4 WITKIN, CALIFORNIA CRIMINAL LAW (3d ed. 2000) PRETRIAL, §§ 15, 154 (criminal felony complaint is not an accusatory pleading; accusatory pleading is either an indictment or information); *cf. United States v. Pace*, 833 F.2d 1307, 1310-12 (9th Cir. 1987) (federal criminal prosecutions do not commence with filing of complaint or issuance of warrant). Thus, the factual finding of the Court of Appeal was not unreasonable. 28 U.S.C. § 2254(d)(2).

3. Invocation of the Right to Counsel

Even if Petitioner could persuasively demonstrate that his Sixth Amendment right had attached when he was arrested, he has not overcome the state courts' finding that he did not invoke his right to counsel. Although there is no dispute that Petitioner told police to "ask [his] attorney," it is not unreasonable to find that this statement — which was not an express request for counsel and was made in response to routine questions — coupled with Foster's clarification that Petitioner did not want an attorney but was only being a "smart ass," was not an invocation of Petitioner's right to counsel. Here, since the state courts expressly found that Petitioner did not invoke his right to counsel, they necessarily found Petitioner was not credible when he testified that he told police, "I want an attorney" on the ride to the police station. Petitioner conceded as much in his Petition for Review. (Pet. for Rev., at 10 n.1.) This factual finding is entitled to deference. 28 U.S.C. § 2254(e).

Specifically, Petitioner cannot demonstrate that had his attorneys made a more explicit Sixth Amendment argument, there is a reasonable probability that the courts would have found that his "ask my attorney" comment to be an unequivocal request for the assistance of counsel. *See Davis v. United States*, 512 U.S. 452, 458-59 (1994) ("[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.") (emphasis in original); *People v. Crittendon*, 9 Cal. 4th 83, 130-31; 36 Cal. Rptr. 2d 474 (1994); *see also Patterson v. Illinois*, 487 U.S. 285, 290-91 (1988) (Sixth Amendment right to counsel must be invoked; its attachment does not automatically preclude interrogation without counsel). Here, although perhaps not in the context of a Sixth Amendment claim, the trial court and the California Court of Appeal both expressly found that Petitioner did not invoke his right to counsel, which is a reasonable interpretation of Petitioner's ambiguous comment made in response to routine or collateral questions.

Moreover, police may question a suspect further to clarify whether he intends an ambiguous comment to be a request for counsel. *Davis*, 512 U.S. at 461-62; *Crittendon*, 9 Cal. 4th at 130 n.7; *see also People v. Farnam*, 28 Cal. 4th 107, 181, 121 Cal. Rptr. 2d 106 (2002) (interrogators may clarify ambiguous statements which might be attempts to invoke *Miranda* rights), *cert. denied*, 537 U.S. 1124 (2003). Therefore, once Petitioner said, "ask my attorney," Detective Foster permissibly clarified Petitioner's intent with respect to his desire to deal with police only through an attorney and determined that Petitioner did not, in fact, wish to invoke his right to counsel.

4. Re-initiation of Contact with Police & Subsequent Waiver of Right to Counsel

Ultimately, even if Petitioner's "ask my attorney" statements unambiguously invoked his right to an attorney, he was later informed of, and waived, his right to counsel. Petitioner contends that this waiver was invalid because he already had invoked his right to counsel. Petitioner would be correct if the police re-initiated a conversation with him, *see Michigan v Jackson*, 475 U.S. 625 (1986) (police may not re-initiate discussion about crime with defendant who has invoked Sixth Amendment right to counsel); however, the state courts found that it was Petitioner who re-initiated conversation with the police when he asked Detective Foster about the reason for his arrest. This is a factual finding entitled to deference under the AEDPA. *United States v. Michaud*, 268 F.3d 728, 737 (9th Cir. 2001); 28 U.S.C. § 2254(e); *see also Oregon v. Bradshaw*, 462 U.S. 1039, 1043-46 (1983) (defendant's question to police, "Well, what is going to happen to me now?" initiated further discussion of facts of crime). Because it was Petitioner, not the police, who reinitiated conversation about the murder, Petitioner's subsequent waiver of his Sixth Amendment right to counsel was valid. *See Patterson*, 487 U.S. at 292-93 (where defendant admonished with *Miranda* warnings, waiver of right to counsel is valid).

Because Petitioner has not demonstrated that counsel should have made a more thorough Sixth Amendment argument, or that the state courts would have been persuaded by such an argument, Petitioner does not show his counsels' ineffectiveness in this regard. Finally, even if Petitioner's

confession had been excluded, there was substantial other evidence of Petitioner's guilt, including Petitioner's concessions in letters sent to police that he was the one who killed the victim. (*See* RT 376-89, 626, 804-10, 869.) Petitioner admitted as much in his trial testimony as well. (*See* RT 766-804.) As for the self-defense theory, Petitioner's actions of hiding the body and destroying evidence suggested Petitioner himself did not feel he was justified in killing the victim. (*See id.*) Therefore, even if counsel had managed to get Petitioner's confession excluded, there is not a reasonable probability of a different result either at trial or on appeal. *Strickland*, 466 U.S. 687.

VI.

DEFENSE OF ACCIDENT

Petitioner contends that the trial court should have instructed the jury *sua sponte* on the defense of accident, that his trial attorney was ineffective because she did not present a defense of accident and that his appellate attorney was ineffective for failing to argue trial counsel's failure in this regard. (First Amended Petition, at 5, att.) Defense counsel did not request, and the court did not give *sua sponte*, CALJIC No. 4.45 which provides:

> When a person commits an act or makes an omission through misfortune or by accident under circumstances that show [no] [neither] [criminal intent [n]or purpose,] [nor] [[criminal] negligence,] [he] [she] does not thereby commit a crime.

CALJIC No. 4.45; *see also* CAL. PENAL CODE § 26(5).

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1. Trial Court's Failure to Instruct with CALJIC No. 4.45

A faulty jury instruction will constitute a violation of due process only where the "instruction by itself so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (citation and internal quotation marks omitted); *Spivey v. Rocha*, 194 F.3d 971, 976 (9th Cir. 1999). Where the alleged error is the failure to give an instruction, the burden on the petitioner to show a due process violation is "especially heavy." *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Villafuerte v. Stewart*, 111 F.3d 616, 624 (9th Cir. 1997) (*quoting Henderson*, 431 U.S. at 154).

A criminal defendant is entitled to have the court instruct the jury on his theory of defense, provided it is supported by law and has some foundation in evidence. *Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 2000); *United States v. Mason*, 902 F.2d 1434, 1438 (9th Cir. 1990). However, "it is *not* reversible error to reject a defendant's proposed instruction on his theory of the case if other instructions, in their entirety, adequately cover that defense theory." *Duckett v. Godinez*, 67 F.3d 734, 743 (9th Cir. 1995) (emphasis in *Duckett*) (quotation omitted). Even where a trial court errs in instructing the jury, moreover, habeas relief will be granted only where a petitioner establishes that the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamsom*, 507 U.S. 619, 637 (1993); *Bains v. Cambra*, 204 F.3d 964, 976-77 (9th Cir. 2000).

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Petitioner's counsel relied on the defense of self-defense, not accident. The only support for the accident defense that this Court could locate in the trial record was Petitioner's testimony, in a single instance, that the shooting was an accident. (RT 798.) The remainder of Petitioner's testimony was that he shot the victim because he feared the victim was going to "stick him" with a knife Petitioner believed the victim threw at him as he fired at the victim. (*See* RT 766-802.)

Moreover, taken as a whole, the jury instructions conveyed to the jurors that if they found that Petitioner did not have the requisite state of mind, for *whatever* reason, then they could not find him guilty of murder. (RT 1182-83, 1189-1201; CT 389-90, 400-23.) Therefore, no due process violation occurred. *Duckett*, 67 F.3d at 743; *cf. Beardslee v. Woodford*, 358 F.3d 560, 576-77 (9th Cir. 2004) (no due process violation where court did not instruct jury on lesser included offense but instructions as a whole properly conveyed defense theory that defendant lacked requisite mental state for greater offense); *see also People v. Jones*, 234 Cal. App. 3d 1303, 1314-16, 286 Cal. Rptr. 163 (1991) (no prejudice from failure to give CALJIC No. 4.45 where other instructions guided the jury in reaching factual determinations and jury's verdicts demonstrated rejection of evidence which might have supported defense of accident).

Finally, even if the court did err, Petitioner cannot demonstrate prejudice. As noted, there was essentially no evidence that the shooting was accidental. In fact, the evidence strongly supported the murder conviction and the jury's implicit finding that Petitioner intended to kill the

victim or that he killed him while intentionally engaging in a dangerous activity, especially considering Petitioner's actions after the murder. For all these reasons, Petitioner is not entitled to habeas relief. *Duckett*, 67 F.3d at 746 (no due process violation where evidence supporting requested defense instruction is weak in comparison to prosecution's case); *Brecht*, 507 U.S. at 637.

2. Counsels' Failures with Respect to Defense of Accident

Petitioner's ineffective assistance of counsel claims fail because trial counsel made a reasonable tactical decision to pursue a defense of self-defense and need not have pursued a conflicting defense of accident. *Strickland*, 466 U.S. at 690-91 ("[S]trategic decisions made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."). Moreover, for the same reasons that Petitioner cannot demonstrate prejudice from the trial court's failure to instruct on accident, trial counsel's failure to argue defense of accident was not prejudicial. *Id.*, at 690. Because trial counsel was not ineffective, appellate counsel was not ineffective for failing to argue that trial counsel performed ineffectively. *United States v. Bosch*, 914 F.2d 1239, 1247 (9th Cir. 1990) (counsel need not make meritless arguments). These claims do not merit habeas relief.

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VII.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the District Court issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) directing that judgment be entered denying the First Amended Petition and dismissing the action with prejudice.

DATED: August 30, 2004

s/ Ralph Zarefsky
RALPH ZAREFSKY
UNITED STATES MAGISTRATE JUDGE